

The record consists of the documents filed of record with the Division of Workers Compensation in this docketed matter including the transcript of the preliminary hearing of March 8, 1994 and the medical records subsequently provided by the claimant at the request of the Administrative Law Judge, along with the narrative report of Philip Mills, M.D., dated May 5, 1994.

ISSUES

The Administrative Law Judge granted claimant's request for benefits and found, for preliminary hearing purposes, that claimant's back condition was compensable as an aggravation of a pre-existing condition. The respondent requests the Appeals Board to review that finding. The issues before the Appeals Board are:

(1) Whether claimant suffered personal injury by accident arising out of and in the course of his employment with the respondent on April 8, 1993. If so, was timely written claim provided?

(2) Did claimant sustain personal injury by accident arising out of and in the course of his employment with the respondent each and every work day after April 8, 1993 through his last day of work preceding his 1994 back surgery due to cumulative trauma? If so, did claimant provide timely notice of injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing, the Appeals Board finds, as follows:

Based upon the evidence presented to date, the claimant has failed to prove that he provided timely written claim for an alleged accidental injury occurring on April 8, 1993, or that he experienced personal injury by accident arising out of and in the course of his employment after April 8, 1993 by reason of cumulative mini-trauma. Therefore, the decision of the Administrative Law Judge that claimant's back claim is compensable is reversed.

(1) On February 4, 1994, claimant filed an application for hearing, Form E-1, alleging a date of accident of April 8, 1993 and every working day thereafter. At preliminary hearing, claimant testified that he injured his back while at work when a stool, upon which he was sitting, broke.

On April 19, 1993, claimant saw his family physician, Dr. Kutilek, for a blood pressure check. Dr. Kutilek's records do not mention the stool incident. Claimant next saw Dr. Kutilek on April 26, 1993. Again, there is no mention of the stool incident or any other work related accident. Dr. Kutilek then refers claimant to Dr. Gregg Snyder who sees claimant on May 12, 1993. Dr. Snyder's notes contain a detailed history of back complaints and injury, but omit mention of any incident occurring at work in April 1993. Claimant goes without medical treatment for approximately seven months until he sees Dr. Toohey on a self referral on December 21, 1993. Dr. Toohey's notes of the initial visit fail to mention claimant's back condition being work related or the stool incident. The first notation in the medical notes substantiating claimant's allegations of work related injury relating to a stool appear in Dr. Toohey's notes of January 13, 1994.

Claimant has a long history of back problems for which he was hospitalized several times since 1989. Claimant's last hospitalization prior to his alleged work related accident occurred in the February 1993. At that time, claimant coughed and developed the sudden onset of acute low back pain that was so severe he went to the floor. Unable to get out of bed, claimant was admitted to the hospital on February 24, 1993, and discharged several days later. In the hospital discharge notes dated February 27, 1993, claimant's physician

indicated that this type of problem had occurred in the past and could occur in the future. The diagnosis in February 1993 was acute sacroilitis, lumbar strain, and degenerative arthritis of the spine. The hospital admission summary of February 24, 1993, indicated that claimant had this pain off and on for several years. Hospital admission records were also reviewed dated January 4, 1991. Those notes indicate that claimant had back pain with radiation down the right leg, similar to an episode that he experienced three years earlier that resolved spontaneously. Claimant's physician diagnosed acute lumbar sacral strain with possible impingement of the L4-5 nerve root on the right. X-rays taken at that time indicated mild degenerative changes at L5-S1. The medical records also contain a hospital discharge summary dated June 9, 1989, which states that claimant's long-term prognosis is recurrent back pain.

Based upon the evidence presented to date, the claimant has failed to prove a new injury to his back or an aggravation of a pre-existing condition as a result of the alleged incident of April 8, 1993.

Pertaining to the alleged accident of April 8, 1993, the claimant has failed to establish that he provided timely written claim to the respondent. K.S.A. 44-520a provides that no proceedings for compensation shall be maintainable under the workers compensation act unless a written claim for compensation is served upon the employer within 200 days after the date of the accident or after the date of last payment of compensation, whichever is longer. Based upon the current status of the evidentiary record, the claimant has failed to prove that the provisions of K.S.A. 44-557 are applicable to extend the time that the proceeding can be commenced.

(2) The claimant has failed to prove that he experienced cumulative mini-trauma subsequent to the initial alleged incident of April 8, 1993. Claimant went for approximately seven months without consulting a physician for his alleged back problems. The medical evidence provided to date fails to establish or support claimant's allegation of injury occurring subsequent to April 1993. The history of multiple hospitalizations prior to April 1993 indicate that claimant has an ongoing low back condition that is subject to flare-up without warning and even absent traumatic injury.

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record. K.S.A. 44-501(a).

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true." K.S.A. 44-508(g).

Based upon the evidence presented to date, for purposes of preliminary hearing, the Appeals Board finds that the order of the Administrative Law Judge should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that, for preliminary hearing purposes, the Preliminary Hearing Order of Administrative Law Judge

Shannon S. Krysl dated May 26, 1994, finding claimant's alleged back claim compensable should be, and hereby is, reversed.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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